

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PATRICIA ALARCON¹)	
Claimant)	
)	
V.)	
)	
CK ENTERPRISES)	
Respondent)	Docket No. 1,076,851
)	
AND)	
)	
GREAT DIVIDE INSURANCE CO.,)	
TECHNOLOGY INSURANCE CO.,)	
ARGONAUT MIDWEST INS. CO.,)	
NEW HAMPSHIRE INSURANCE CO.²)	
Insurance Carriers)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 9, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Duncan A. Whittier of Topeka, Kansas, appeared for claimant. Daniel N. Allmayer and Lloyd W. Raber of Kansas City, Missouri, appeared for respondent and Great Divide Insurance Company. Kristina Mulvany and Katie Black of Kansas City, Kansas, appeared for respondent and Technology Insurance Company.

The ALJ found claimant suffered an injury by repetitive trauma to her back and legs on April 21, 2016. The ALJ found claimant's alleged injury by repetitive trauma to her left and right upper extremities are the natural and probable consequence of a left arm injury claimant sustained in a separate September 2, 2011, work-related injury by accident. The ALJ barred compensation related to the 2011 injuries to claimant's upper extremities because no application for hearing was filed within three years of the date of the accident or two years of the date of the last payment of compensation. The application for hearing

¹ Claimant identifies herself as Patricia Alarcon, though she worked under the name Alitha DeLeon Wolfert. Claimant received medical treatment under the names Alitha DeLeon and Alitha Wolfert.

² Argonaut Midwest Insurance Company and New Hampshire Insurance Company have since withdrawn from this case, as the dates alleged by claimant do not fall within the respective coverage periods.

related to the April 21, 2016 series, including both upper extremities, was filed on March 9, 2016.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 29, 2016, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues she sustained injuries to her upper extremities by repetitive trauma, and the 2011 accident is not a part of the current claim. Claimant notes, “[E]ven if the 2011 left arm injury is included, claimant received authorized medical treatment for that arm during 2012 and on December 12, 2014. As such, the claim was timely filed.”³ Claimant contends the date of her repetitive trauma injuries is April 21, 2016, the date a physician diagnosed her injuries as work-related.

Great Divide Insurance Company argues claimant does not allege a claim within its coverage period of September 30, 2010, through September 30, 2014. Alternatively, Great Divide Insurance Company adopts and incorporates the arguments and authorities in the brief submitted by respondent and its insurer Technology Insurance Company.

Respondent and Technology Insurance Company (respondent) maintain claimant failed to sustain her burden of proving the alleged repetitive trauma is the prevailing factor causing her bilateral upper extremity condition. Respondent asserts claimant’s bilateral upper extremity injuries stemmed from the work-related accident of September 2, 2011, and thus claimant failed to timely file an application for hearing.

The issues for the Board’s review are:

1. What is the date of claimant’s injury by repetitive trauma?
2. Did claimant file a timely application for hearing?

FINDINGS OF FACT

Claimant began working for respondent in 2009 as a sanitation worker, working 38-40 hours per week. Her job duties consist of cleaning meat and scraps, cleaning floors with pressurized hoses, and taking out trash containers. On weekends, claimant spends approximately 20-30 minutes cleaning disassembled machine parts. Claimant testified she lifts up to 30 pounds performing her job duties. Claimant was assisted by an interpreter during the preliminary hearing.

³ Claimant’s Brief (filed Sept. 12, 2016) at 2.

On September 2, 2011, claimant sustained an injury to her left arm when it was caught in a machine. Claimant underwent surgery with Dr. James McAtee on September 6, 2011, after which she was off work for three months. Claimant's pain did not improve with surgery. Claimant was referred by Dr. McAtee to Dr. Steven Peloquin on April 12, 2012, when she was diagnosed with complex regional pain syndrome. Claimant was provided stellate blocks, medication, and physical therapy. Claimant treated with Dr. Peloquin until July 10, 2012. Records indicate the last day of payment by respondent for medical treatment was August 14, 2013.⁴

Claimant testified she began having pain and intermittent swelling in her right upper extremity, with numbness in her fingers, after returning to work following the 2011 surgery. Claimant estimated these symptoms developed in 2012. Claimant described, "When I started working with my both arms [*sic*], I felt pain in my left arm. But as I have to use my both arms [*sic*], I started experiencing pain in the other arm too."⁵ Claimant has not sought nor received medical treatment related to her right upper extremity. Claimant testified she reported her right arm condition to her supervisor multiple times.

On December 12, 2014, claimant was taken to Geary Community Hospital by her supervisor with complaints of left arm pain. Claimant testified:

Q. Was this pain similar to the pain you had in your left arm from your accident in 2011?

A. Yes.

Q. The same location?

A. Yes. The one – the pain that I feel in my arm, it goes from my fingers to my shoulder.

Q. So the pain in your left arm, has that been ongoing since the 2011 accident?

A. Yes.⁶

X-rays taken at Geary Community Hospital indicated "no acute osseous finding is seen."⁷ Claimant was treated with medication and discharged.

⁴ See P.H. Trans., Resp. Ex. A at 1. The payments reflected were made by respondent and Great Divide Insurance Company.

⁵ P.H. Trans. at 29.

⁶ *Id.* at 32.

⁷ *Id.*, Cl. Ex. 1 at 12.

Claimant received a letter dated January 2, 2015, from respondent's claims department acknowledging receipt of notice of an injury occurring December 12, 2014.⁸

Claimant filed an E-1, Application for Hearing with the Division on March 9, 2016, alleging repetitive use injuries to her upper extremities, back, neck, and all parts affected thereby. Claimant indicated the repetitive trauma date as a "series each and every day worked beginning in 2009 and continuing to present."⁹

Dr. Pedro Murati examined claimant on April 21, 2016, at claimant's counsel's request. Claimant's chief complaints included swelling, pain, numbness, and tingling in her hands, arms, and fingers; bilateral arm fatigue; pain in both shoulders, worse on the left; and a feeling "like symptoms are returning in left arm before undergoing stellate ganglion blocks."¹⁰ Dr. Murati reviewed claimant's history and medical records, noting claimant indicated her job duties were repetitive in nature, with physical requirements of bending, lifting, pushing, pulling, climbing, kneeling, reaching, walking, and climbing stairs. He further noted claimant lifts over 35 pounds occasionally, and less than 35 pounds frequently.

Dr. Murati performed a physical examination and reported the following impressions:

1. Status post ORIF left arm, secondary to 2011 injury.
2. Chronic Regional Pain Syndrome, mostly resolved secondary to 2011 injury.
3. Contusional left carpal tunnel syndrome secondary to 2011 injury.
4. Left shoulder rotator cuff tear versus sprain secondary to 2011 injury.
5. Right shoulder rotator cuff tear versus sprain secondary to overuse and repetitive job duties.
6. Myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, secondary to over use.
7. Bilateral quadriceps and calf sprain.¹¹

Dr. Murati imposed restrictions on claimant and recommended conservative treatment, including medications, injection, and physical therapy. He indicated surgical consultation may be warranted should claimant not improve. Dr. Murati wrote:

The claimant sustained a work related accident and multiple repetitive traumas at work which resulted in bilateral upper extremity, neck, upper back and bilateral lower extremity complaints. . . . She has no significant pre-existing injuries that

⁸ P.H. Trans., Cl. Ex. 2 at 4.

⁹ Application for Hearing filed March 9, 2016.

¹⁰ P.H. Trans., Cl. Ex. 1 at 5.

¹¹ *Id.* at 7-8.

would be related to her current diagnoses. . . . She has significant clinical findings that have given her diagnoses consistent with her described accident and multiple repetitive traumas at work. Apparently, on this claimant's date of injury she sustained enough permanent structural change in the anatomy of her bilateral upper extremity, neck, upper back and bilateral lower extremity which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of her conditions is the specific accident in 2011 and multiple repetitive traumas at work.¹²

Claimant continues to work for respondent. She testified she was given lighter work duties in approximately March 2016.

PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2015 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2015 Supp. 44-508(e) states:

"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

¹² *Id.* at 8-9.

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2015 Supp. 44-534(b) states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁴

ANALYSIS

1. What is the date of claimant's injury by repetitive trauma?

Claimant alleges an injury by repetitive trauma on or about April 21, 2016, the date Dr. Murati diagnosed her injuries as work-related. Respondent alleges the correct date of injury is September 2, 2011. The ALJ found claimant suffered an injury by repetitive trauma to her back and legs on April 21, 2016. The undersigned agrees claimant met the burden of proving a series of repetitive traumas through April 21, 2016.

Implicit in determining the date of injury by repetitive trauma is determining the body parts affected by the injury. Dr. Peloquin's records support the ALJ's finding that claimant's left upper extremity is not related to the April 21, 2016, series. Dr. Peloquin's records support a finding that claimant developed complex regional pain syndrome as the result of

¹³ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁴ K.S.A. 2015 Supp. 44-555c(j).

a work-related injury in November 2011. Dr. Murati's report also supports a finding that claimant's left upper extremity complaints are related to the 2011 injury, and not the April 21, 2016, series.

In addition to the left upper extremity findings Dr. Murati opined were secondary to the 2011 injury, he noted a possible right rotator cuff tear or sprain, cervical and thoracic myofascial pain syndrome, and bilateral quadricep and calf sprain. Dr. Murati opined these conditions were the direct result of claimant's alleged injury by repetitive trauma. In this regard, Dr. Murati's opinions are uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.¹⁵

The uncontroverted medical evidence supports a finding claimant suffered an injury by repetitive trauma to her right shoulder, cervical and thoracic myofascial pain syndrome, and bilateral quadricep and calf sprains as a result of repetitive trauma arising out of and in the course of her employment with respondent on or about April 21, 2016.

2. Did claimant file a timely application for hearing?

The analysis of this issue relates more to the relationship of claimant's left upper extremity and the April 21, 2016, series. Even though the 2011 injury was not docketed, and thus not before the ALJ or the Board, the undersigned agrees with the ALJ's finding claimant failed to file a timely application for her 2011 injury by accident to her left shoulder. Claimant agrees the 2011 accident is not part of this claim and argues the left shoulder problems alleged are a part of the new series. Dr. Murati notes in his report claimant's chronic regional pain syndrome, left carpal tunnel syndrome and left rotator cuff issues are secondary to the 2011 injury. The undersigned finds all left shoulder complaints are related to the 2011 injury and will not be included in this claim.

CONCLUSION

Claimant met her burden of proving she suffered an injury by repetitive trauma to her right shoulder, cervical and thoracic region, quadriceps and calves on or about April 21, 2016. Claimant filed a timely written claim for her April 21, 2016, injury by repetitive trauma. Claimant's left shoulder complaints are related to an injury by accident on September 2, 2011, and not related to this claim.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated August 9, 2016, is affirmed, in

¹⁵ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

part, and modified to include the cervical and thoracic spine and right upper extremity complaints.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Rebecca Sanders, Administrative Law Judge